

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

CONCERTO SOLOISTS d/b/a THE CHAMBER
ORCHESTRA OF PHILADELPHIA¹

Employer

and

Case 4–RC–21019

PHILADELPHIA MUSICIANS' UNION LOCAL 77,
AMERICAN FEDERATION OF MUSICIANS, AFL-CIO²

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer, The Chamber Orchestra of Philadelphia, is a small, elite orchestra which performs at concerts and other engagements. The Petitioner, Philadelphia Musicians' Union Local 77, has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Musicians who perform in the Chamber Orchestra. There are about 33 Musicians in the petitioned-for unit. The Employer contends that the Musicians are independent contractors and thus are excluded from the coverage of the Act.

A hearing officer of the Board held a hearing, and the parties filed briefs. I have considered the evidence and the arguments presented by the parties, and as discussed below, I have concluded that the Musicians are statutory employees. Accordingly, I am directing an election in a bargaining unit of the Employer's Musicians.³

To provide a context for my discussion, I will first present a brief overview of the Employer's operations. Then, I will review the factors that must be evaluated in determining independent contractor status and present in detail the facts and reasoning that support my conclusion that the Musicians are statutory employees.

¹ The Employer's name was amended at the hearing.

² The Petitioner's name was amended at the hearing.

³ The parties agreed that if there is an election, the following classifications should be excluded from the unit: Conductor, Music Director, office clericals, all other employees, guards, and supervisors as defined in the Act.

I. OVERVIEW OF OPERATIONS

The Employer has been in existence since 1964 and performs classical music from the late 18th and early 19th centuries, as well as other works written for chamber orchestras. The orchestra performs at the Pearlman Theatre of the Kimmel Center for the Performing Arts in Philadelphia during its regular season each year from mid-to-late September until late May or early June of the following year. Its subscription series consists of 10 programs with two performances of each program, along with occasional concerts at locations other than the Kimmel Center. The Chamber Orchestra also serves choral organizations and churches, which hire orchestra members to perform with their choruses, and provides Musicians for non-profit organizations, corporate events, and weddings and other private parties. These additional events take place primarily during the Orchestra's regular season.⁴ Robert J. Elias is the Employer's Executive Director.

The full Chamber Orchestra performs with 33 Musicians, who are selected by the Employer's Music Director, Ignat Solzhenitsyn.⁵ It is uncontested that they are all highly-skilled performers. Not all Musicians play at every performance; the make-up of the orchestra depends on which instruments are required for the particular pieces to be performed.

For the most part, the same Musicians are recalled by the Employer year after year. Thus, the same 33 Musicians have comprised the Chamber Orchestra for at least the last two seasons, and some Musicians have been recalled continuously for more than 25 years. Most of the Musicians also work for other musical entities in the Philadelphia area such as the Opera Company of Philadelphia, the Philly Pops, and the Pennsylvania Ballet, and they are represented for collective bargaining with these organizations by the Petitioner.⁶

Before each season ends, "Letters of Agreement" are sent out to all of the Musicians who are expected to return for the following season setting forth their compensation and some other terms and conditions of employment. For the current season, September 2004 to early June 2005, 29 of the 33 Musicians received 1099 forms, and the remaining four received W-2 forms.⁷ The Employer has indicated that for the 2005-2006 season, all employees will receive 1099 forms.

⁴ Certain Musicians in the Chamber Orchestra, who received 1099 forms as discussed below, are invited but are not required to play at these outside engagements. If not enough Musicians are willing to perform, the Employer contracts with outside Musicians to play at the events.

⁵ Musicians audition with Solzhenitsyn and are selected based on their musical excellence and performance excellence.

⁶ The Petitioner represents Musicians at other locations in the Philadelphia area such as the Philadelphia Orchestra, the Forrest Theatre, the Merriam Theatre, the Prince Music Theater, the Savoy Opera Company, and the Academy of Vocal Arts. The only location where Musicians enjoy full-time employment in the area is the Philadelphia Orchestra. All other employment at these Philadelphia area institutions is on a part-time basis.

⁷ The Letters of Agreement for musicians who received W-2 forms was a detailed six-page document, while the Letters of Agreement sent to the musicians who received 1099 forms is a one-page document.

II. FACTORS RELEVANT TO EVALUATING INDEPENDENT CONTRACTOR STATUS

Section 2(3) of the Act expressly excludes “any individual having the status of an independent contractor” from the definition of “employee” and thus the protection of the Act. The party asserting that an individual is an independent contractor has the burden of establishing that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In assessing whether an individual is an employee or an independent contractor, the Board applies common law agency principles to the factual context. *NLRB v. United Insurance Company of America*, 390 U.S. 254, 258 (1968). The multifactor analysis set forth in Restatement (Second) of Agency, Section 220, includes the following factors to be examined: (1) the length of time the individual is employed; (2) the method of payment, whether by time or by the job; (3) whether the employer or the individual supplies the instrumentalities, tools, and place of work; (4) whether the individual is engaged in a distinct occupation or business; (5) whether the employer is “in the business”; (6) the skill required in the particular occupation; (7) whether the employer retains the right to control the manner and means by which the result is to be accomplished; (8) whether the parties believe they are creating an employment relationship; (9) whether the work is part of the employer’s regular business; and (10) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain.⁸ *Pennsylvania Academy of the Fine Arts*, 343 NLRB No. 93, fn. 1 (2004). See *BKN, Inc.*, supra; *Roadway Package System*, 326 NLRB 842 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). The Board has indicated that the Restatement factors are not exclusive or exhaustive, that no single factor is controlling, and that in applying the common-law agency test, it will consider “all the incidents of the individual’s relationship to the employing entity.” *BKN, Inc.*, supra; *Slay Transportation Company, Inc.*, 331 NLRB 1292, 1293 (2000); *Roadway Package System*, supra.

III. FACTS

A. The Employment Agreements

The Letter Agreement references an enclosed schedule of all the concerts and rehearsals⁹ at which the Musician will perform in the following season and requires the Musician’s attendance at each of these events. There are usually four rehearsals and two performances for each of the 10 programs. Rehearsals last about two-and-a-half hours, and performances last about one-and-a-half to two hours.¹⁰ The Letter Agreement requires that Musicians learn the music in advance of the first rehearsal, arrive at the hall no later than 20 minutes before “downbeat” for all rehearsals and concerts, be in their seats five minutes before downbeat of rehearsals, and return from rehearsal breaks within the allotted time. They are also required to

⁸ Entrepreneurial risk is evidenced where earnings are dictated by self-determined policies, personal investment, and market conditions. *The News Journal Company*, 227 NLRB 568, 570 (1976).

⁹ The Agreement defines a “service” as a performance or rehearsal.

¹⁰ Solzhenitsyn’s cover memo to the Agreement stated that he was changing dress rehearsals from three hours to two-and-a-half hours and that if they go overtime the Musician will be paid accordingly.

adhere to the concert dress code, to be available for two photo sessions in concert dress, and to remain an additional half hour for rehearsals if required by the Music Director. If the Musician has a scheduling conflict which he or she cannot resolve, he or she must contact the Music Director immediately for permission to miss an event. In this connection, the agreement provides that the Musician and the Music Director “must jointly determine” by the date the signed agreement is due, the Musician’s “willingness and ability to re-commit” for the upcoming season.¹¹

The Agreement does not include a disciplinary policy. Elias testified that the Employer would retain the final say as to whether a Musician should be disciplined but that no Musician has misbehaved during Elias’ tenure with the Employer.

The four Musicians who received W-2 forms were asked to sign a six-page agreement for the period September 13, 2004 to June 13, 2005 that was far more detailed than the Letter Agreement. Among other things, it indicated that Musicians would be paid twice per month, and it provided for payment by the Employer for Social Security, unemployment and workers’ compensation benefits, and health insurance and instrument insurance coverage.¹² As the Employer is no longer paying any Musicians using W-2 forms, in late April 2005 the Employer sent the Letter of Agreement for the Employer’s 2005-2006 season to the four Musicians who had previously received W-2 forms.

B. Musician Compensation

The Letter Agreements for the 2005-2006 season set forth a rate of \$122 per service through January 30, 2006 and a rate of \$130 from January 31, 2006 through June 5, 2006,¹³ along with “mileage, transportation and per diems, when applicable, paid at the prevailing union rates.” Some of the agreements give premium payments for leading players of the Chamber Orchestra, including the Concertmaster, Associate Concertmaster, and section principals. All section principals receive a 20 percent premium per service above the standard rate. For the 2004-2005 season, the average annual pay received by the Musicians who received 1099 forms was \$9,970, with some receiving as much as \$16,000 and others receiving \$4,000 to \$5,000. For

¹¹ While it is possible that a request by a Musician to the Music Director to be excused from a rehearsal or performance could be denied, in Executive Director Elias’ experience about 12 such requests have been made by Musicians over the last few years, and none of them have been denied.

¹² This agreement also detailed travel expenses and compensation to be paid the Musician for tapings. It also addressed the Employer’s right to terminate the agreement with the Musician under certain conditions, the missing of services by the Musician due to illness, reporting times, break times, overtime, payment for additional rehearsals, and mandatory appearance at photographic sessions. It included a stipulation that the Employer was entitled to an injunction to prevent a breach of any provision of the agreement. One of the four Musicians paid in this manner received additional pay for “cartage” because he carried a large instrument, and another received additional pay for performing some administrative duties for the Employer.

In February 2005, the Employer met with Musician representatives and stated that while the possibility had been explored by the Board of Directors of extending W-2 status to all the Musicians, the Board of Directors decided not to do so for financial reasons.

¹³ The record indicates that there are “variations” between the per service payments among the Musicians, but does not specify the nature of these variations, other than the premium payments.

those Musicians who do not receive premium payments, the pay disparity resulted from the number of services each Musician performed, because some musical pieces did not require all of the instruments.

In the two years during which he has acted as Executive Director, Elias has been asked by two Musicians for additional compensation. Last year, one of the Musicians who received a W-2 form asked to work six additional services at her rate of \$130 per service, and this request was granted. Recently, for the upcoming 2005-2006 season a section principal Musician asked for a 40 percent over scale rate rather than a 20 percent over scale rate. The Employer had not yet decided if it is going to grant this request.

The Musicians who received 1099 forms were paid for the entire season within 10 days of their final performance. No taxes were withheld from their pay, and they received no vacation pay, holiday pay, health insurance, retirement or any other benefits.

C. The Role of the Music Director

The Music Director provides overall direction of each piece performed by the Chamber Orchestra. He recalls Musicians from season to season and decides which Musicians to audition and when to conduct the auditions. Thus, on April 2005, the Employer notified the members of the Chamber Orchestra of the results of auditions among the 15 violin and viola players. If there is an opening for a Musician, the Employer advertises locally and regionally, but generally fills the position by word of mouth. Rehearsals are normally two-and-a-half hours long, but if someone is not needed for the entire time, he or she may be excused by the Music Director. The rehearsals take place at the Kimmel Center and elsewhere.

The Music Director gives overall direction as to how each piece should be played. He tells the Musicians how he would like the music to sound, but he does not instruct them how to play their instruments to achieve that sound.

D. Miscellaneous

Most Musicians provide their own instruments and their own concert dress. The Musicians who receive 1099 forms insure their own instruments. The Employer provides chairs, music stands, pianos, tympanis and keyboards, and occasionally rents other instruments as needed. The Employer also provides the printed musical pieces. While the Employer does not tell Musicians to practice on their own time, the record reflects that they regularly do so.

IV. ANALYSIS

When faced with an independent contractor issue, the Board must determine whether the party asserting an independent contractor relationship has put forth sufficient facts to conclude that a business relationship between independent contractor and client exists rather than an employment relationship. As previously stated, no single factor is controlling in making the determination.

In *BKN, Inc.*, 333 NLRB 143, 144 (2001), the Board found freelance television scriptwriters to be employees within the meaning of the Act. The writers worked out of their homes, set their own hours, provided their own equipment and materials, were not subject to discipline, were paid per episode, could work for other employers, received no benefits, and had no taxes or other payroll deductions withheld. The Board concluded, however, that an employer-employee relationship existed because the Employer exercised significant control over the creative process, the writers performed functions that were an essential part of the Employer's operations, and the writers were an integral part of the Employer's business under the Employer's substantial control. Thus, when they were writing scripts for the Employer, the writers worked exclusively for the Employer, and the work they produced had to conform to the Employer's specifications.

In reaching this conclusion in *BKN*, the Board distinguished *DIC Animation City*, 295 NLRB 989 (1989), in which freelance animation writers were found to be independent contractors. Critically, the animation writers bore some of the risks and enjoyed some of the opportunities for gain associated with an entrepreneurial enterprise since they spent significant time and effort soliciting work and faced the possibility that their ideas could be rejected and they would not get paid. Some of the writers in *DIC* formed their own "loan out" companies with which the employer contracted for the writers' services, while others formed their own writing teams and decided which part of the script each member would write and how much each member would be paid. Also, the *DIC* writers could negotiate the number of scripts on which they would work, as well as residuals, royalties, and any guaranteed work on future projects.

This level of control over one's terms and conditions of employment and the entrepreneurial risk accompanying such control, as demonstrated by the freelance animation writers in *DIC*, were factors heavily relied upon by the Board most recently in finding independent contractor status in *Pennsylvania Academy of Fine Arts*, 343 NLRB No. 93 (2004). In that case, the models who worked at an art school had complete control over their schedules for the employer. They could decide how many classes to accept, what hours to work, and which specific classes to accept, and they could choose their schedule according to which professors and types of classes they prefer, which class times were convenient, or on any other basis they wished. This resulted in a wide variation among the models' hours worked from 1.5 to hundreds of hours per semester and enabled the models to control their own earnings, a major factor in determining independent contractor status. The Board emphasized that models' contracts were valid for only a semester and that there was no ongoing relationship between the models and the art school. The Board also found that the models were in the business of modeling, while the employer was in the business of running an art school, and that the models' contracts explicitly reflected each participant's understanding that the models were independent contractors. The Board also found that the models had a high level of skill, which they needed to strike and hold their poses, and that they supplied their own instruments and tools of work, such as robes, slippers, and padding. Significantly, the Board made it clear that its decision in the case did not "potentially exclude all those engaged in creative endeavors" from employee status under the Act. Rather, the Board indicated that it would continue to consider all of the Restatement factors in reaching a decision on whether sufficient evidence existed to find an individual an independent contractor rather than an employee. *Id.* at fn. 3.

In contrast to the facts of *Philadelphia Academy of Fine Arts*, in the instant case the Musicians do not select which performances or rehearsals to attend; rather, the Employer controls where, when, and how long each of its Musicians will rehearse and perform during its regular 10-month season. The Employer decides what music will be played, which of its Musicians will perform the music, and which Musicians will serve as its principal players. Further, the fact that the vast majority of Musicians return year after year evidences a continuity of employment and a clear identification with the Chamber Orchestra, in which each Musician's individual creative expression is integrated into a group product. The Employer also sets rules as to the lengths of rehearsals and the Musicians' timeliness and appearance. These factors are strongly indicative of employer control over the manner and means of performance of the work. See *BKN*, supra; *American Federation of Musicians (Royal Palm Dinner Theater)*, 275 NLRB 677, 681-682 (1985); *Castaways Hotel*, 250 NLRB 626, 642-644 (1980).

Another significant factor which distinguishes the Musicians from the animation writers in *DIC*, as well as the advertising photographers found to be independent contractors in *Young & Rubicam International, Inc.*, 226 NLRB 1271 (1976),¹⁴ is the lack of entrepreneurial risk to them while working for the Chamber Orchestra. The Musicians are paid a set fee for a set number of rehearsals and performances, which is unilaterally determined by the Employer, along with mileage, transportation and per diem payments at the prevailing union rates. While two of the Musicians have requested extra compensation, negotiation of the fees set by the Employer appears to be a rare event. The Employer provides the venue for the rehearsals and performances, the music to be played, music stands, and large instruments. Thus, the Employer's Musicians bear few of the risks and enjoy little opportunity for gain normally associated with an entrepreneurial enterprise; their only opportunity to vary their earnings is through outside employment. In contrast, in cases such as *DIC*, *Young and Rubicam*, supra, and *Boston After Dark, Inc.*, 210 NLRB 38 (1974) (freelance writers for a weekly newspaper), the creative artists found by the Board to be independent contractors had no guarantee that their work would be accepted, and they had the right to refrain from contributing material at any time, while in the instant case the Musicians are guaranteed work but must commit to working a full season.

In *Pennsylvania Academy of Fine Arts*, slip op. at 3, the Board found the freedom to work for multiple employers to be significant in determining independent contractor status. However, the Board has held in other cases that freedom to engage in outside employment is not dispositive of employee status because statutory employees may work on a part-time basis and hold other jobs. In those cases, the Board emphasized that it is the relationship between the individual and the putative employer which must be examined in order to determine whether that is a relationship of employer to employee or independent contractor to client. See *BKN*, supra; *Musicians (Royal Palm Theater)*, supra.

There are, unquestionably, factors which tend to support a finding that the Musicians are independent contractors. These include the fact that most of the Musicians supply their own instruments and all of them are highly-skilled individuals selected based on their talent and

¹⁴ In that case, among other things, most of the photographers were incorporated as businesses, they advertised and employed agents to obtain work, and they hired and paid full-time employees.

experience. Additionally, the Musicians often perform for other cultural institutions, they receive 1099 forms and no benefits, and they are paid by the service, not by the hour or on a salary basis.

In this case, however, I find that the factors favoring an employee finding, outweigh the factors favoring an independent contractor finding. The major factors demonstrating employee status include the continuity of employment of the Musicians, the fact that the Musicians' performances constitute the Employer's regular business, the Employer's retention of the right to control the manner and means by which the performance of music is to be accomplished, and, most important, the Musicians' lack of entrepreneurial risk of loss or gain. I therefore find that the Employer has not carried its burden of demonstrating that the Musicians are independent contractors. Accordingly, I find that they are employees and shall direct an election in the petitioned-for unit.

While the identity of the Musicians who will comprise the Chamber Orchestra for the 2005-2006 season has likely been determined, the location of those Musicians over the summer months has not been established on the record, and it is uncertain how many Musicians will be available to vote. In a seasonal operation such as this one, the Board prefers to hold elections when a high percentage of the voting unit is working, to ensure adequate turnout. *Industrial Forestry Association*, 222 NLRB 295 (1976); *Bogus Basin Recreational Association*, 212 NLRB 833 (1974). I find that the highest possible number of eligible voters will be present and working for the Employer commencing in September 2005. Therefore, I am directing that an election take place during the 2005-2006 season with the precise date to be determined by the Regional Director after consultation with the parties.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain of the employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Musicians who perform during the regular season series of the Chamber Orchestra of Philadelphia, **excluding** the Conductor, Music Director, office clericals, all other employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION¹⁵

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **Philadelphia Musicians' Union Local 77, American Federation of Musicians, AFL-CIO**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

Eligible to vote in the election are unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of issuance of the Notice of Election, the Employer must submit to the Regional Office an election eligibility list, containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should

¹⁵ The eligibility date for the election shall be the payroll period immediately preceding the date on which the Notice of Election is issued.

be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658 or by E-mail to Region4@NLRB.gov.¹⁶ Since the list will be made available to all parties to the election, please furnish a total of two (2) copies, unless the list is submitted by facsimile or E-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by E-mail. For details on how to file a request for review by E-mail see <http://gpea.NLRB.gov/>. This request must be received by the Board in Washington by 5:00 p.m., EDT on **June 23, 2005**.

Signed: June 9, 2005

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

¹⁶ See OM 05-30, dated January 12, 2005, for a detailed explanation of requirements which must be met when electronically submitting representation case documents to the Board, or to a Region's electronic mailbox. OM 05-30 is available on the Agency's website at www.nlr.gov.